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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. ~~827~~ 89

EASTERN STEAMSHIP LINES, INC.,
Petitioner,

v.

FRANCIS J. MULLIGAN, as Public Administrator of the Goods, Chattels and Credits of James Brodie Hutchinson, Deceased.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

ARTHUR M. BOAL,
Counsel for Petitioner.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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No. .....

EASTERN STEAMSHIP LINES, INC.,
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FRANCIS J. MULLIGAN, as Public Administrator of the Goods, Chattels and Credits of James Brodie Hutchinson, Deceased.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

EASTERN STEAMSHIP LINES, INC., a general agent of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on December 29, 1948.

Opinion Below.

The opinion of the United States Court of Appeals for the Second Circuit is reported in 170 F. 2d. 882 (Record 341).

Jurisdiction.

The judgment of the Court of Appeals was entered on December 29, 1948 (Record 357). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). The time for presenting this petition was extended to May 2[illegible], 1949.

Questions Presented.

The question presented is whether after the effective date of the Clarification Act of March 24, 1943, petitioner, a private steamship company, employed by the United States as its agent, and not as an independent contractor, to manage and conduct the accounting and certain other shore-side business operations of government vessels, is liable for the death of a member of the crew of such a vessel caused by the negligence of another member of the crew.

Statutes Involved.

The statutes involved are the War Shipping Administration (Clarification) Act (57 Stat. 45; 50 U. S. C. App. 1291), the Jones Act (41 Stat. 1007; 46 U. S. C. 688), the Federal Employers' Liability Act (35 Stat. 65, as amended; 45 U. S. C. 51) and R. S. 1753 (5 U. S. C. 631).

Statement.

The *S.S. Francis Amasa Walker* was a Liberty vessel owned and operated by the United States. The petitioner was the ship's husband or general agent under the Wartime standard form of service agreement. The Respondent's

> "Intestate was a boatswain on that vessel who received fatal injuries on February 1, 1945, while performing his duty in attempting to carry out an order to tighten a guy wire, a part of the torpedo net defense equipment of the ship which had been installed by the United States Navy and was maintained by the Navy."

* * * * * *

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> "This equipment consisted of two heavy steel nets which were, when being used for protection from torpedoes, suspended over and along each side of the ship at a suitable distance and lowered into the water. The rigging by which they were thus moved and held in place included four booms, eight heavy steel guywires with turnbuckles and six stanchions. When the ship was loading or discharging cargo these nets with their rigging would have interfered with the work if kept in protective position. They had therefore been dismantled in port sufficiently to permit the vessel to load, and the decedent was fatally injured while at work preparing them to be put in protective position after the vessel was again at sea."

The respondent's intestate, while attempting to tighten the turnbuckle turned it the wrong way and the screw came out of the turnbuckle. Respondent's intestate lost his balance and fell to his death.

The Court of Appeals held that there was evidence from which the jury could have found that the eye bolt which came out of the barrel of the turnbuckle was defective, and

> "But the gear had been on the ship for at least one previous voyage across the Atlantic and back and it had been inspected by a mate who then knew, or should have known, that the turnbuckle was defective in the respects here shown and whose knowledge is attributable as a matter of law to the appellant."

Then the Court said:

> "On the second issue we hold that the appellant, as the operating agent of the vessel, is not immune from suit because of the provisions of the Clarification Act, *supra*, and do so for the reasons stated in our recent decision in *McAllister* v. *Cosmopolitan Shipping Co.*, 2 Cir., 169 F. 2d 4."

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In holding that petitioner was chargeable with knowledge that the ship's gear was defective.

2. In holding that petitioner was liable for the negligence of an employee of the United States, a member of the crew of the *S.S. Francis Amasa Walker.*

3. In following its own decision in *McAllister* v. *Cosmopolitan Shipping Co.,* 169 F. 2d. 4, in which this court had already granted a writ of certiorari.

4. In affirming the judgment of the district court holding the petitioner liable to the respondent.

Reasons for Granting the Writ.

The issue presented by this case is whether a civil service employee of the United States, a member of the crew of a merchant vessel owned and operated by the United States may recover for injuries received while serving on board such vessel in a suit against the ship's husband or shoreside agent as if the latter were the employer. The court below, basing its decision on its own holdings in *McAllister* v. *Cosmopolitan Shipping Co., Inc.,* 169 F. 2d. 4, has held that he may. The issue presented by this case is identical with those in the *McAllister* case, *Gaynor* v. *Agwilines, Inc.,* 169 F. 2d. 612 (C. C. A. 3) and *Fink* v. *Shepard S. S. Co.,* 192 P. 2d. 258 (Ore.) rehearing denied, 193 P. 2d. 537. The holding of the court below is in direct conflict with the *Gaynor* and *Fink* cases. We submit that it is clearly wrong.

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This court granted certiorari on November 22, 1948 in *Cosmopolitan Shipping Co., Inc.* v. *McAllister* (No. 351), *Fink* v. *Shepard S. S. Co.* (No. 360), and *Gaynor* v. *Agwilines, Inc.* (No. 162). These three cases were argued before this court on February 1-2, 1949 but no decision has as yet been handed down.

1. The decision of the court below permits recovery in a case arising subsequent to the Clarification Act. (War Shipping Administration (Clarification) Act of March 24, 1943 c.26, 57 Stat. 45, as amended (50 U. S. C. App. 1291)). The decision was based on the same court's holding in *McAllister* v. *Cosmopolitan Shipping Co., Inc., supra,* which was admittedly in conflict with the decision of the Supreme Court of Oregon in *Fink* v. *Shepard S. S. Co., supra,* and is also in direct conflict with the decision of the Court of Appeals for the Third Circuit in *Gaynor* v. *Agwilines, Inc., supra.*

The court below in the *McAllister* case relied on the reasoning of this court in *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, although it recognized that the opinion in that case expressly disclaimed any intention of dealing with liability for acts of negligence occurring subsequent to the passage of the Clarification Act.

Seamen employed on Government vessels during the war were civil service employees of the United States. It was the intent of Congress when it gave Government seamen the right of privately employed seamen to restrict the endorsement of these rights to suits in Admiralty against the United States. The rights were to be measured by those of seamen in private employment rather than by those of other civil service employees of the Government However, the seamen in question remained civil service employees of the United States. The context of the Act

and its legislative history clearly exclude any notion that the seamen were regarded by Congress as employees of the general agent. See *Gaynor* v. *Agwilines, Inc.*, 169 F. 2d. 612 at 615. The Clarification Act would have been unnecessary had Congress regarded the seamen as employees of the agent since, had they been, they would have had the right to recover from the agent under the Jones Act without any further legislation. As stated by the Supreme Court of Oregon in the *Find* case:

> "It would have been wholly unnecessary to accord to seamen in private employment the rights of seamen in private employment (192 P. 2d. at 268)."

2. Third persons other than seamen could not recover against the general agent under similar circumstances. See *Caldarola* v. *Eckert*, 332 U. S. 155, *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575; *Publicker Commercial Alcohol Co.* v. *American-Hawaiian S. S. Co.*, 165 F. 2d. 1002, 1006 (C. C. A. 3); *Dichmann, Wright & Pugh* v. *Weade*, 168 F. 2d. 914 (C. C. A. 4), certiorari granted October 11, 1948, No. 179; *McGowan* v. *J. H. Winchester Co.*, 168 F. 2d. 924 (C. C. A. 2), certiorari denied November 8, 1948, No. 311; *Palardy* v. *American-Hawaiian S. S. Co.*, 169 F. 2d. 619 (C. C. A. 3). United States Courts of Appeal have also held that the general agent is not liable as employer to the seamen for wages. *Aird* v. *Weyerhaeuser S. S. Co.*, 169 F. 2d. 606 (C. C. A. 3); *Shilman* v. *United States et al*, 164 F. 2d. 649 (C. C. A. 2), certiorari denied February 16, 1948, 333 U. S. 837.

However, confusion exists and a conflict of decision has arisen in the lower courts with respect to the rights of the Government's employees to recover against the general agents for torts. These questions require settlement by this court.

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3. In addition to the court below, in holding petitioner liable for the negligence of intestate's fellow civil service employee in doing work of the United States which was not subject to the petitioner's control or direction, failed to take account of this court's decision in *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575, 584, 585, *Denton* v. *Yazoo & M. V. R. R. Co.*, 284 U. S. 305, 308-309 and *Caldarola* v. *Eckert*, 332 U S. 155, 159.

Under settled principles the liability of the ship's husband or shore-side busines agent is limited to the torts of those who are doing the work of the agent in attending to such shore-side business. The possible conflicts between the *Hust* and *Caldarola* cases as to whether or not a cause of action against the shore-side agent has been established constitute a matter for determination by this court.

4. The importance of the case extends far beyond the question of the injured man's forum or the extent of his recovery. There are serious issues affecting the immunity of Government vessels in foreign ports as well as immunity from regulation and taxation by local governments. In war time there are also serious questions as to the security of information regarding ship movements and operations.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

May, 1949.

ARTHUR M. BOAL,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 89.

EASTERN STEAMSHIP LINES, INC.,
Petitioner,

v.

FRANCIS J. MULLIGAN, as Public Administrator of the Goods, Chattels and Credits of James Brodie Hutchinson, Deceased.

PETITIONER'S REPLY BRIEF.

ARTHUR M. BOAL,
Counsel for Petitioner.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 897.

EASTERN STEAMSHIP LINES, INC.,
Petitioner,

v.

FRANCIS J. MULLIGAN, as Public Administrator of the Goods, Chattels and Credits of James Brodie Hutchinson, Deceased.

PETITIONER'S REPLY BRIEF.

The basic issue in this case is whether a ship's husband or general agent for the shoreside business of a government-operated vessel is liable to a civil-service employee of the United States, serving as a seaman on the vessel, for the failure of the Government to supply him with a safe place to work as a result of the negligence of fellow civil-service crew members. This Court in *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. ....., following *Caldarola* v. *Eckert*, 332 U. S. 155, and overruling *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, held such general agents not to be so liable. That decision is controlling here.

Established principles thus require the grant of the petition herein accompanied by an immediate remand of the case for further proceedings by the district court in accordance with the opinion announced in the *McAllister*

case. To escape this normal impact of *McAllister*, respondent advances in this Court for the first time the novel contention that petitioner, defendant below, and not himself, as plaintiff, had the burden of proving that it disclosed that it was an agent for the United States and that respondent and his fellow civil-service crew members were employees of the United States (Br. 3). Because of this novel departure by respondent from his previous theory of the case, petitioner submits this reply for the convenience of the Court.

Discussion.

Respondent public administrator brought this suit to recover for the death of his intestate, a civil-service seaman of the United States employed on a vessel operated by the War Shipping Administration who was injured by the negligence of his fellow crew members in failing properly to connect a turnbuckle which formed part of the vessel's torpedo defense gear (Br. in op. 2). Petitioner answered, denying that it operated the vessel or employed the decedent (R. 3-4, paras. 3, 5; R. 6, para. 1). The only evidence of petitioner's relation to respondent or the vessel was that it was operated in accordance with the wartime standard form GAA 4-4-42 agency agreement considered by this Court in the *McAllister* case (R. 71, 318-334). The issue thus raised was submitted to a jury on a charge which instructed them that petitioner was under obligation to furnish the deceased government employee a safe place to work and safe appliances (R. 140) and would be liable if it negligently failed to do so (R. 143-144). Respondent specifically concedes that his intestate "lost his life through the negligence of fellow servants" (Br. in op. 2). The court below, affirming the judgment entered on the jury's verdict, ex-

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pressly held that petitioner could be held liable for the negligence of a fellow servant, "a mate who then knew, or should have known, that the turnbuckle was defective" (R. 345).

1. The heart of respondent's contention in this Court is that the proceedings of the two lower courts establish the equivalent of an employer-employee relationship between his intestate and petitioner, the Government's agent, and that therefore he may recover from petitioner for the negligence of the Government's civil-service crew members (Pet. 6). Respondent repeatedly asserts that petitioner failed to disclose that the United States and not itself was operator of the vessel and even declares that counsel stipulated that "petitioner operated the *SS. Francis Amasa Walker*" (Br. in op. 2, 3, 6).

Without regard to the fact that these supporting assertions by respondent are directly contrary to the record,* we submit that respondent lacks standing to press this contention for the first time in this Court. The district court charged the jury and the court below affirmed on the ground that petitioner was not a "ship's husband" but an "operating agent" (R. 346). The Court below affirmed on the authority of its decision in the *McAllister* case which this court has now reversed. Since it is elementary that a ship's husband is a mere shoreside functionary while an operating agent is owner *pro hac vice* of the vessel, both courts imposed liability on petitioner for failure to furnish a safe place to work (R. 140, 143-144). In fact, the court below

* It was stipulated "that the *Francis Amasa Walker* was operated under a general agency agreement in the standard form" (R. 71, 318-334)—not that the vessel was operated by petitioner as stated by respondent (Br. in op. 2). The answer denied (R. 6, para. 1) the allegations of the complaint that petitioner operated the vessel and employed decedent (R. 3-4, paras. 3, 5).

expressly found that the verdict was supported by evidence that the mate "then knew, or should have known that the turnbuckle was defective" and that his knowledge "is attributable as a matter of law" to petitioner (R. 345). Finally, respondent concedes that "neither in its brief nor in its argument before the Court of Appeals did respondent attempt to fasten liability on the petitioner for its failure to prove that it made disclosure of its principal and that matter was not considered by that Court" (Br. in op. 2).

We submit that respondent's attempt to sustain the judgment on a ground urged for the first time in this Court and not submitted to the jury nor considered by the lower courts must be rejected and the case remanded for further proceedings.

2. Respondent urges that the decisions of the lower courts are sustainable because "*petitioner* did not introduce the shipping articles in evidence; it offered no proof that it disclosed to respondent's intestate or other members of the crew that it was acting as an agent, that its principal was the United States and that the crew were employees of the United States" (Br. in op. 2). In support of this argument respondent cites the language of District Judge Knox in *Lewis* v. *U. S. Navigation Co.*, 57 F. Supp. 652, that "an agent who enters into a contract with another, and in his own name, without disclosure of the name of his principal, may be held for liability thereon" unless the agent proves that fact of agency was known to the plaintiff. Respondent concludes that petitioner failed to sustain this burden in the trial court and is therefore liable because of its failure to disclose.

Assuming respondent's standing to raise this question for the first time in this Court, the inapplicability of his

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argument to this case is apparent. There is no evidence that petitioner entered into any contract with the decedent without disclosing it was acting as agent for the United States. Unlike the situation presented by the record in the *Lewis* and other cases cited by respondent, where the plaintiffs' evidence established the defendant-agents had dealt with plaintiffs in the guise of principals operating the vessel for themselves, here the record shows only that petitioner was employed by the United States to attend to certain parts of the vessel's shoreside business and, as this Court recognized in *McAllister*, was denied any authority or control over the vessel itself and its civil-service crew members. Respondent, as plaintiff below, had the same burden of first introducing the shipping articles as had the plaintiffs in the cases on which he relies. If, as in those cases, the articles when offered in evidence failed to disclose that petitioner was acting not as operating owner on the voyage, but only as general agent for the United States, the burden of proving that some other adequate disclosure of petitioner's agency would have fallen on petitioner. On the present record, we submit, petitioner's status is fixed by the text of the GAA 4-4-42 agreement alone as only a ship's husband and accordingly the *McAllister* case is dispositive and requires a remand.

3. It is well settled that whoever is the operating owner for the voyage is liable for wages, maintenance, improper discharge, and all other obligations due the seamen and the statutes require the operating owner to be named in the articles (46 U. S. C. 564, 565, 713). But the seaman's statutory contract is with the master and if he is to recover from another, he has the burden of establishing that the party thus sought to be held liable was in fact the operat-

ing owner of the vessel for the voyage and not a time or voyage charterer or agent for a limited purpose, nor yet a general owner who has parted with the operation and control of his vessel to another who operates it as owner *pro hac vice*. *Everett* v. *United States*, 284 Fed. 203 (C. A. 9), certiorari denied, 261 U. S. 615; *The Del Norte*, 119 Fed. 118, 123 (C. A. 9); *The John E. Berwind*, 56 F. 2d 13 (C. A. 2); *Bacarat* v. *Andrew F. Mahoney Co.*, 1933 A. M. C. 1652, 1656 (N. D. Calif.); *Roberts* v. *United States S. B. Emergency Fleet Corp.*, 240 N. Y. 474, 477; *Cox* v. *Lykes Bros.*, 237 N. Y. 376. And in order that government seamen, like respondent's intestate, should be informed of their status beyond any possible doubt, WSA required that the shipping articles should be filled out to state, in the space for the name of the registered owner or operating company for the voyage, "United States of America, War Shipping Administration," and in the space for the address, "c/o XYZ Company, General Agent," giving the address of the agent (War Shipping Administration Operations Regulation No. 88 Revised). Moreover, all copies of the articles, including in particular that which is required by 46 U. S. C. 577 to be posted in the forecastle, are customarily imprinted with a rubber stamp advising members of the crew that they are not employees of the agents but exclusively employees of the United States through the War Shipping Administration.

Respondent's failure to introduce the shipping articles when he had an opportunity to do so speaks for itself. The shipping articles are a public document, certified copies of which are available to all on application to the Coast Guard. As respondent recognizes, they would have been dispositive here. We submit, therefore, that respondent has no standing with regard to the question he now seeks to raise, that

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the burden of introducing the shipping articles was on him alone, and that in the present state of the record the case can only be remanded to the district court for further proceedings. It was assumed in the District Court by the counsel for the respondent, by counsel for the petitioner and by the court that Francis Amasa Walker was operated under the same general agency agreement and in the same manner as was the *Mark Hammond in Hust* v. *Moore-McCormack Lines*, 328 U. S. 707.

Conclusion.

For the reasons stated in the petition and further explained herein a writ of certiorari should be granted. Moreover, the basic question in this case has recently been resolved by this Court contrary to the decision of the court below. Therefore, we believe that it would be appropriate for this Court to reverse the judgment of the Court of Appeals without further briefs or argument and to remand the case for further proceedings by the district court.

Arthur M. Boal,
Counsel for the Petitioner.

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EASTERN STEAMSHIP LINES, INC.,
Petitioner,

vs.

FRANCIS J. MULLIGAN, as Public Administrator of the Goods, Chattels and Credits of James Brodie Hutchison, Deceased,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

GEORGE J. ENGELMAN,
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Supreme Court of the United States

EASTERN STEAMSHIP LINES, INC.,
Petitioner,

against

FRANCIS J. MULLIGAN, as Public Administrator of the Goods, Chattels and Credits of James Brodie Hutchison, deceased,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

Respondent brought this action under the Jones Act for the wrongful death of his intestate, arising out of injuries sustained on February 1st, 1945, while serving as a member of the crew of the *S.S. Francis Amasa Walker;* petitioner was charged with negligence (Record, pp. 3-5). Respondent's intestate was tightening a turnbuckle when one of the screws parted from the barrel of the turnbuckle and he was thereby precipitated to the deck, sustaining injuries causing his death (Record, pp. 200-205). Respondent obtained a jury verdict in the amount of $23,000.00 (Record, p. 155). Petitioner appealed to the United States Court of Appeals, Second Circuit, which affirmed the judgment below, 170 F. 2d 882 (Record, p. 341).

The Court of Appeals found that the case was submitted to the jury on "the condition and installation of the turn-

buckle" (Record, p. 344). There was evidence that the turnbuckle which was always disconnected in port, when cargo was worked, had not been connected and set up in a safe, proper and customary manner by the crew; there was evidence that the worn condition of one of the eyebolts of the turnbuckle was due to careless handling by the crew (Record, pp. 97, 129 to 134, 165, 184). Thus, the verdict was a finding that respondent's intestate lost his life through the negligence of fellow servants. Petitioner, in item 2 of its "Specification of Errors to be Urged" on page 4 of its petition, concedes that the Court of Appeals held that petitioner was liable for the negligence of "a member of the crew of the *S.S. Francis Amasa Walker*".

Counsel for the parties stipulated that the petitioner operated the *S.S. Francis Amasa Walker* under the "wartime standard form of agency agreement G.A.A. 4-4-42" (Record, p. 211), considered by this Court in *Cosmopolitan Shipping Company* v. *McAllister*, decided by this Court June 27th, 1949. Although respondent's intestate was employed on a foreign voyage and signed Shipping Articles, petitioner did not introduce the Shipping Articles in evidence; it offered no proof that it disclosed to respondent's intestate or other members of the crew that it was acting as an agent, that its principal was the United States and that the crew were employees of the United States.

The Court of Appeals held the petitioner liable for the negligence found, for the reasons it had given in *McAllister* v. *Cosmopolitan Shipping Company, Inc.*, 2 Cir. 169 F. 2nd 4 (Record, p. 346). Believing that *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707, was controlling, neither in its brief nor in its argument before the Court of Appeals did respondent attempt to fasten liability on the petitioner for its failure to prove that it made disclosure of its principal and that matter was not considered by that Court.

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Question Presented.

Is the petitioner, a general agent of the United States under the wartime standard form of agency agreement, "G.A.A. 4-4-42" liable as an employer under the Jones Act, for the wrongful death of respondent's intestate, brought about by the negligence of fellow servants, when it offered no proof that it disclosed to respondent's intestate and to the crew, that it was an agent, that the United States was its principal and that the crew were employees of the United States.

POINT I.

A general agent must prove that there was disclosure to the officers and crew that it was an agent, that the United States was its principal and that the officers and crew were employees of the United States, or it is estopped to deny liability as an employer in a lawsuit against it under the Jones Act, based on the negligence of fellow servants.

Because the general agent procures the officers and crew through the "usual channels" and "in accordance with the customary practice of commercial operators", under Art. 3 A (d) of the General Agency Agreement, set forth in the opinion of this Court in the *McAllister* case, the performance of the agreement by the general agent will cause the officers and crew to believe that they are employees of the general agent unless disclosure is made to them. In the *McAllister* case this Court recognized the importance of such disclosure and in fact the holding of that case is based upon it. There, the Shipping Articles under which McAllis-

ter was employed, were offered in evidence and not only recited that the steamship company was "general agent for the United States" but further gave notice to the officers and crew that they were "employed by the United States", and this Court, at the conclusion of its opinion said:

> "The Shipping Articles summarized above, p. 2., complied with the tenor of the General Agency Agreement by making it clear that respondent was an employee of the United States."

Where there is no disclosure, the General Agent is estopped to deny liability as an employer, for the complement of the vessel have been led to believe that they are employees of the General Agent and that they have the usual rights, including the right of jury trial, in a personal injury action under the Jones Act against the General Agent; further, they have been deprived of the right to refuse employment by the United States and to insist upon the more liberal remedies against a private operator. And the burden is on the General Agent to prove as a defense that it disclosed to members of the crew the name of its principal, *Lewis* v. *U. S. Navigation Company*, 1944 A. M. C. 1241. There Judge Knox held a General Agent liable for damages in an action brought against it under the Jones Act, by a member of the crew, because of the negligence of a fellow servant, where the General Agent failed to prove that it disclosed to the plaintiff, the name of its principal, Judge Knox said:

> "Nevertheless, it was held in Horan *v.* Hughes, 129 Fed. 248, aff'd 129 Fed. 1055, that an agent who enters into a contract with another, and in his own name, without making disclosure of the name of his principal, may be held to liability thereon. In order to create a valid defense, he must prove that such disclosure was made. No such proof is now before the

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court. If any exists, it should have been made to appear. Plaintiff, apparently, was without knowledge of the agency agreement between defendant and the United States, and such agreement cannot deprive plaintiff of his rights under his contract of employment. Brady *v.* Roosevelt S. S. Co., *supra.* When plaintiff responded to (defendant's) call for men to man the ship, he was not told of the existing agency, and he had a right to assume, under practices long familiar to seamen, that he was being employed by defendant."

Koistinen v. *American Export Lines, Inc.*, 1948 A. M. C. 1464, and *Yancey* v. *North Atlantic and Gulf Steamship Co.*, 1948 A. M. C. 317, are to the same effect.

It is well settled in law that an agent is personally liable unless it makes disclosure of the identity of its principal. *Holt* v. *Ross*, 54 N. Y. 472; *Cobb* v. *Knapp*, 71 N. Y. 438; *DeRemmer* v. *Brown*, 165 N. Y. 410; *Horan* v. *Hughes*, 129 Fed. 248, aff'd 2 Cir., 129 Fed. 1005. The latter case applied the principle in Admiralty. In placing the burden on the agent to make disclosure of the identity of its principal, the Court of Appeals said:

> "It is not sufficient that the seller may have the means of ascertaining the name of the principal. If so, the neglect to inquire might be deemed sufficient. He must have actual knowledge. There is no hardship in the rule of liability against agents. They always have it in their power to relieve themselves, and when they do not, it must be presumed that they intend to be liable."

In the *McAllister* case, this Court said:

> "We assume without deciding that the rule of the Hearst case applies, that is, the word 'employment' should be construed so as to give protection to sea-

> men for torts committed against them by those standing in the proximate relation of employer, and the rules of private agency should not be rigorously applied."

Certainly petitioner stands in more than the "proximate relation of employer", for failure to disclose its principal. And, authorities already cited, hold that the "rules of private agency" *can* be rigorously applied and yet petitioner can not escape liability as an employer.

The verdict was a finding that wrongful death was occasioned by the negligence of fellow servants of respondent's intestate; because of petitioner's non-disclosure of its principal, those fellow servants, as well as respondent's intestate, had an employee relationship to petitioner; therefore, petitioner is liable for their negligence.

POINT II.

The petition should be dismissed.

Respectfully submitted,

GEORGE J. ENGELMAN,
Attorney for Respondent.

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OCTOBER 10, 1949.

Per Curiam Decisions.

No. 89. EASTERN STEAMSHIP LINES, INC. *v.* MULLIGAN, PUBLIC ADMINISTRATOR. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court for disposition in the light of *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783. *Arthur M. Boal* for petitioner. *George J. Engelman* for respondent. Reported below: 170 F. 2d 882.